BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)))))))	MB Docket No. 05-311

INITIAL COMMENTS OF CHARTER COMMUNICATIONS, INC. ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

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April 20, 2007

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Pursuant to the Commission's Report And Order And Further Notice of Proposed Rulemaking ("Order") released March 5, 2007, Charter Communications, Inc. ("Charter") respectfully submits the following initial comments in response to the Commission's Further Notice of Proposed Rulemaking ("Further Notice").[1]

I. INTRODUCTION AND SUMMARY

The primary goal of the Commission's Order is to promote competition, which the Commission states "will benefit consumers by driving down prices and improving the quality of service offerings."[2] Charter concurs with the Commission's goal of setting regulatory policy in order to benefit consumers, and submits that the same goal should control the Commission's resolution of the issues raised in its Further Notice. Indeed, even Charter's competitors agree, as the Commission has recognized that competitors do not oppose treatment of existing cable operators on an equal regulatory footing.[3]

Accordingly, the Commission should, and indeed must, hold that its interpretation of the Cable Act's provisions apply equally to all cable operators, regardless of when the operator entered the market or the current status of their franchise. For example, to protect consumers from excessive, hidden taxation, the Commission's interpretation of which local franchising authority ("LFA") requirements constitute franchise fees that apply against the statutory 5% cap must apply immediately to all LFA requirements, regardless of when the cable operator entered

[1] By submitting these comments, Charter does not concede that the Commission has authority to enact the rules or take the actions set forth in the Order, or to interpret the Cable Act in one way for new entrants and a different way for existing cable operators.

[2] Order ¶ 2.

[3] Order ¶ 139.

the market or obtained its franchise. In addition to being required by the language and policy of the Cable Act, such an action would be consistent with the Commission's track record of seeking to promote robust competition by subjecting providers of the same services to the same level of regulatory obligation.

Similarly, the Commission should clarify that its conclusions regarding Institutional Network ("I-Net") requirements immediately apply to all cable operators. Burdening existing cable operators with requirements for I-Nets to provide free telecommunications service while new entrants are free from such requirements will not serve consumers and is inconsistent with the plain language of the Cable Act.

Placing all cable operators on the same regulatory cost footing will promote robust competition that will in turn benefit consumers, as the Commission seeks. On the other hand, subjecting Charter to unlawful and burdensome legacy requirements will not serve consumer interests; indeed, it may limit its ability to compete both on price and through investment in new technologies and services. Indeed, the implications for Charter's subscribers are far reaching. The overwhelming majority of Charter's subscribers are served pursuant to long term franchises that are not subject to renewal for years. If the Commission's "tentative conclusion" were adopted, millions of Charter's subscribers would be deprived for years of the benefits of robust competition because of legacy regulatory costs that serve no consumer interest and are not imposed on well-financed, ILEC new entrants. To promote its goal of easing market entry, the Commission need not and should not handcuff existing operators.

II. IMMEDIATE UNIFORM APPLICATION OF THE COMMISSION'S INTERPRETATION OF "FRANCHISE FEES" IS NECESSARY TO PROTECT CONSUMERS

A critical part of the Commission's findings in the Order is the Commission's guidance on the interpretation of whether particular LFA requirements constitute "franchise fees" that should be counted against the Cable Act's 5% cap on franchise fees.[4] While the interpretation of "franchise fee" under Section 622 of the Cable Act is a purely statutory matter, in the Further Notice, the Commission seeks comment on its tentative conclusion that its findings in the Order should apply to cable operators with existing franchises only when they reach renewal of those agreements.[5] As demonstrated below, as to all of the Commission's findings, and particularly as to the Commission's interpretation of what constitutes a "franchise fee" under the Cable Act, the Commission's findings do and must apply equally to all cable operators, immediately. Forcing Charter to wait until renewal would simply undermine the development of full competition and thus deny consumers of the benefits sought by the Commission, for years. It would also violate the plain language of the Cable Act.

A. The 5% Cap On Franchise Fees Is Designed To Protect Consumers

The Commission's conclusions regarding the interpretation of "franchise fees" that are subject to the Cable Act's 5% cap must be driven by the consumer protection and political accountability purposes of the cap. In the Cable Act, as amended, Congress crafted a scheme that allows LFAs to require the payment of franchise fees, but at the same time, in Section 622, carefully limits the extent of those fees in order to protect cable consumers. 47 U.S.C. § 442.

[4] Order ¶¶ 94-109.

[5] Order ¶ 140.

The legislative history of the 1984 Cable Act clearly expresses the consumer protection concern that drove the Cable Act's franchise fee limitations. For example, Congressman Bliley said: "[t]he sad fact is that cable television has been viewed by many cities as a golden cash cow, a panacea which would provide a seemingly endless number of services to city residents while at the same time fattening city coffers with franchise fees. Consumers have suffered from this attitude." 130 Cong. Rec. E855 (Mar. 7, 1984). Similarly, the Senate Committee Report explains that "it is necessary to impose such a franchise fee ceiling because the committee is concerned that, without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors." S. Rep. No. 98-67, at 25 (1983); *see also, e.g.*, 129 Cong. Rec. 15461 (daily ed. June 13, 1983) (statement of Sen. Goldwater) ("to prevent local governments from taxing private operators to death as a means of raising local revenues for other concerns").

Congress' intention to protect consumers was not limited to the 5% cap alone. Congress further limited the ability of LFAs to burden cable consumers by narrowly defining the cost impositions that are exempt from treatment as franchise fees subject to the 5% cap. As the Commission recognizes, Section 622(g)(1) broadly defines the scope of what is a "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority . . . on a cable operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. § 542(g)(1). At the same time, it excludes only a narrow, specifically identified group of costs, including, for example, "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages," 47 U.S.C. § 542(g)(2)(D), and "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities," 47 U.S.C. § 542(g)(2)(C). And those exceptions have been narrowly construed. As the Commission recognized, courts have rejected attempts by LFAs to bootstrap costs (*e.g.* consultant's costs) into the bucket of "incidental to the awarding or enforcing of the franchise."[6]

Congress expressed a clear intent for all cable consumers to be protected by the franchise fee limitations and cap in Section 622. The Commission cannot forsake that intention and cable consumers by purporting to limit the ability of existing cable operators to avail themselves of their rights under Section 622.

B. Delaying Application Of The Commission's Rules Until Cable Operators Reach Renewal Is Inconsistent With The Commission's Pro-Competition, Pro-Consumer Policies

Immediate equal treatment of existing cable operators is not only consistent with the Cable Act's design to protect cable consumers from excessive LFA impositions, but it is also supported by the Commission's competition policies. The Commission has for years sought to promote competition and deployment of advanced technologies and services by eliminating legacy regulations and placing competitors on equal regulatory footing.[7] For example, in the *Wireline Broadband Order*, the Commission adopted the same Title I regulatory classification for DSL that had previously been given to cable modem service, proclaiming that "we should regulate like services in a similar manner" to promote market-based investment decisions, not

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[6] *See, e.g.,* Order ¶ 103.

[7] *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd 14853 (rel. September 23, 2005) ("*Wireline Broadband Order*").

ones driven by regulatory disparities.[8] In addition, the Commission emphasized the importance of "creat[ing] a regime that is technology and competitively neutral."[9] These points were reiterated in the subsequent *BPL Order*, in which the Commission explained its "goal of developing a consistent regulatory framework across broadband platforms by regulating like services in a similar manner."[10] This principle of treating like service providers alike was reinforced once again less than three months ago in the *Wireless Broadband Order*.[11]

Furthermore, the Commission has concluded that subjecting incumbents to excessive requirements that new entrants do not face impedes the incumbents' ability to compete and thus undermines benefits to consumers. For example, in its telecommunications unbundling rules, the Commission sought to "ensure[] that our rules provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition."[12] The same rationale should apply here. Maintaining onerous and expensive franchise obligations on existing cable operators while exempting well financed new entrants from those same obligations will simply divert into local fees and costs cable operator resources that could otherwise be used to invest in new

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[8] *Wireline Broadband Order* at ¶ 45.

[9] *Id.* at ¶ 3.

[10] *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion & Order, 21 FCC Rcd 13281, ¶ 2 (rel. November 7, 2006) ("*BPL Order*").

[11] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless* Networks, Declaratory Ruling, FCC 07-30, ¶ 2 (rel. March 23, 2007) ("Addressing the appropriate regulatory classification of wireless broadband Internet access also furthers our efforts to establish a consistent regulatory framework across broadband platforms by regulating like services in similar manner.") ("*Wireless Broadband Order*").

[12] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 2 (rel. February 4, 2005).

technologies and services and to respond to pricing competition. Thus, asymmetric obligations on existing operators will interfere with, rather than promote, robust, facilities-based competition.

Recently adopted state cable franchising statutes also have generally followed the policy of putting existing cable operators on the same regulatory footing as their ILEC competitors. For example, legislators in Kansas, Michigan, New Jersey, North Carolina, South Carolina, and Virginia, in adopting statutes addressing new entrants have recognized that in order for incumbents to effectively compete, they must be allowed to adopt the same level of franchise obligations upon competitive market entry. Accordingly, Michigan allows incumbents to terminate existing franchises and enter into the "uniform agreement" new entrants may use.[13] New Jersey incumbents may automatically convert franchises into a "system wide authorization;" and Virginia cable operators may opt-in to an "ordinance cable franchise." Each of those statutes is an example of regulatory solutions designed to instantly ease the administrative burden on new entrants that are also applied equally to incumbents.[14] Furthermore, even the states that did not adopt immediate opt in provisions generally provide for the same regulations to apply to both ILECs and cable wherever the two begin to directly compete with each other. Kansas, North Carolina, and South Carolina have adopted such conditional opt-in provisions for cable operators, providing relief from existing incumbent franchise obligations once ILEC video competition arrives in a locality.[15]

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[13] MCLS § 484.3305(2)(a).

[14] 2007 Mo. SB 284 (RSMo § 67.2679, signed into law March 22, 2007); N.J. Stat. § 48:5A-25.1(a); Va. Code Ann. § 15.2-2108.26.

[15] Cal. Pub. Util. Code § 5930(c); 2005 Kan. SB 449 (signed into law April 7, 2006) ("Whenever two or more video service providers are providing service within the jurisdiction of

The policies of this Commission and state legislators recognize that subjecting existing operators for years to requirements that ILEC new entrants do not face will harm consumers. By imposing on existing operators a regulatory cost burden to which their well financed new competitors are not subject, the Commission would only serve to artificially increase the existing operator's costs. That increase in the incumbents' relative cost would impede their ability to compete robustly, for example through price competition or investment in advanced technologies or services. As a result, consumers would not enjoy the benefits intended by the Commission -- a harm that under the Commission's tentative conclusion would continue for years for millions of consumers.

C. As A Statutory Matter, The Commission's Interpretation Of Provisions Of The Cable Act Cannot Apply Differently To Different Cable Operators Based On When They Enter The Market

In addition to the persuasive, pro-consumer policy reasons for applying the Commission's interpretation of the Cable Act to all cable operators immediately, the plain language of the statute also mandates immediate identical application.

As a threshold matter, there is no basis in the Act or in the legislative history to support the Commission's tentative conclusion to apply a different interpretation of Section 622 to new entrants versus existing operators. Section 622 does not provide different standards based on when an operator obtained its franchise. Section 622(b) speaks of "franchise fees paid *by a cable operator* . . . ." 47 U.S.C. § 542(b) (emphasis added). Similarly, Section 622(g) defines the term

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a municipality, a cable operator with an existing municipally issued franchise agreement may request that the municipality modify the terms of the existing franchise agreement to conform to the terms and conditions of a state-issued video service authorization."); N.C. Gen. Stat. § 66-355(a)(2); S.C. Code Ann. § 58-12-325.

"franchise fee" to include any tax, fee, or assessment imposed "on a cable operator or cable subscriber, or both." 47 U.S.C. § 542(g)(1). There is no differentiation in the type of "cable operator." Indeed, the Commission recognizes that the statute on its face does not support differential treatment, stating in the Further Notice that Sections 611 and 622 "do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants."[16]

When Congress intended to allow different treatment based on the timing of the franchise, it did so explicitly. For example, in Section 624, Congress expressly differentiated the ability of LFAs to establish or enforce certain requirements based on whether the franchises were in effect prior to the 1984 Cable Act or granted after the Act. 47 U.S.C. § 544(b) & (c). Similarly, Section 621(a)(1) delineates its application to the award of "an additional competitive franchise" or applications for a "second franchise." 47 U.S.C. § 541(a)(1). Sections 611 and 622, in contrast, do not distinguish between different operators or between franchises granted at different times, as the Commission recognizes.[17]

The Commission's tentative conclusion purports to rest on some general authority under Section 621(a)(1). But Sections 622 and 611 are specific provisions, addressing detailed and particular matters. It is well established that the Commission cannot use a general statutory provision or policy objectives to trump specific provisions, like those in Sections 611 and 622. *See, e.g.*, *Federal Communications Comm'n v. Midwest Video Corp.*, 440 U.S. 689 (1979) (holding under the Communication Act, pre-1984 Cable Act, that the Commission lacked

[16] Order ¶ 140.

[17] Order ¶ 140.

jurisdiction, based on alleged statutory policy objectives, to impose common carrier public access obligations on cable operators in conflict with a specific statutory provision prohibiting such common carrier treatment); *see also National Mining Association v. US Department of the Interior*, 105 F.3d 691, 694 (DC Cir. 1997) (general rulemaking authority provisions do not allow agency "to trump Congress's specific statutory directive[s]"). The specific language of Sections 622 and 611 must apply in their plain manner, as they always have.

Ultimately, the Commission's interpretation of Section 622 relies on and reiterates existing law, as it already applies to all cable operators. The Commission begins with the observation that "[t]he general law with respect to franchise fees should be relatively well known, but we believe it may be helpful to *restate the basic propositions here* in [an] effort to avoid misunderstandings that can lead to delay in the franchising process as well as unreasonable refusals to award competitive franchises."[18] The Commission then proceeds to rely on and restate existing case law. In particular, the Commission cites to *Robin Cable*, *Birmingham* and *Briggs*, each of which applied Section 622 to existing cable operators.[19]

Nonetheless, the Commission seeks to shut out existing operators. Despite its recognition that it is restating the current law as it applies to all cable operators, the Commission asserts that its findings apply to existing cable operators only upon renewal. That conclusion clearly exceeds the Commission's authority. Indeed, it usurps the jurisdiction of the federal courts. The Commission cannot vacate existing cases and eliminate over two decades worth of law that otherwise would apply to all existing cable operators. The Commission cannot free LFAs from

[18] Order ¶ 94 (emphasis added).

[19] Order ¶ 103.

judicial oversight and statutory restraints that otherwise apply and give them *carte blanche* to exceed the 5% franchise fee cap. Surely, the Commission did not intend to usurp the jurisdiction of the courts; yet, that is exactly what it will do if it adopts its tentative conclusion that its statements do not apply until renewal.[20]

Creating regulatory winners and losers through differential application of statutory standards will not promote competition or serve consumers. As the Commission has recognized, "the most effective method of promoting the interests of viewers or consumers is through the free play of competitive market forces."[21] Accordingly, the Commission should clarify that its interpretations of provisions of the Cable Act apply immediately to all cable operators.

III. THE COMMISSION SHOULD CLARIFY THAT DEMANDS FOR I-NETS THAT ARE UNRELATED TO CABLE TELEVISION SERVICE ARE UNREASONABLE AND UNENFORCEABLE

A significant issue raised in comments filed prior to the Order was demands by LFAs for items unrelated to the provision of cable service, including I-Nets. For example, the Commission heard about demands for the construction of data networks to serve as replacements for the LFAs' commercial telecommunications needs. On that point, Verizon discussed in detail how it was "frequently" encountering demands to construct broadband data networks for the municipality, or to offer free services to the municipality or to other people selected by the LFA.[22] Verizon noted that under the guise of "I-Nets," LFAs were seeking for free "the types of broadband services that Verizon is in the business of selling to both residential and business

[20] Order ¶ 94.

[21] *See, e.g.*, Order ¶ 7 n. 13 (quoting *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, 5012 (1990))

[22] Comments of Verizon On Video Franchising, MB Docket No. 05-311, at 72 (Feb. 13, 2006) ("Verizon Comments").

customers."[23] Similarly, the United States Telecom Association provided examples of LFAs seeking fiber networks to municipal buildings and obtaining discounted telephone services.[24] AT&T, likewise, discussed how LFAs sought free provision of services that were otherwise commercial telecom services.[25]

Based on the comments,[26] the Commission concluded that it is unreasonable for LFAs to impose requirements for matters unrelated to the provision of cable service. That conclusion must also immediately apply to all cable operators.

While the Commission asserts that its decision is limited to competitive applicants under Section 621(a)(1), it is clear that it is actually interpreting Section 611 and Section 621(a)(4)(B).[27] As AT&T, among others, explained, Section 611(b) makes clear that only "channel capacity" on existing institutional networks may be dedicated to educational or

[23] *Id.* at 75.

[24] Ex Parte Notice of USTelecom, MB Docket No. 05-311, p. 20 (filed July 28, 2006).

[25] Comments of AT&T, Inc., MB Docket No. 05-311, at 68-69 (Feb. 13, 2006).

[26] *See, e.g.*, Order ¶ 111 (citing Verizon comments).

[27] *See* Order ¶ 112 (addressing Section 611(b) limitations on LFA requirements). Indeed, the Commission contends in the Order that it can reach these conclusions by interpreting what is meant by the term "adequate [PEG] channel capacity, facilities and financial support" in Section 621(a)(4)(b). *Id.* ¶¶ 112, 116. Even if true, Section 621(a)(4)(B), like Section 611(b), applies to all cable operators. 47 U.S.C. § 541(a)(4)(B). It is not stated in terms of a "second franchise," like Section 621(a)(1). Thus, to the extent the Commission reached conclusions on what constitutes "adequate" I-Net requirements under that Section, they must apply to existing and new operators alike.

governmental use.[28] It does not authorize LFAs to require the provision of broadband services or telecommunications services that providers sell directly to residential and business customers.[29]

As with the equal and immediate application of the Commission's interpretation of franchise fees under Section 622, elimination of unreasonable I-Net obligations on existing cable operators under Section 611 will ultimately serve consumer interests. While in some cases, preservation of certain legacy regulatory obligations on incumbents may protect consumers and competitors, such as measures designed to prevent ILECs from cross-subsidizing competitive entry, the I-Net regulatory impositions at issue here are not of that type. Charter is subject to many "I-Net" demands that mirror commercial fiber, voice, and data services. Providing and/or maintaining those "I-Nets" is expensive and burdensome, and therefore imposes a burden and expense on Charter's customers. Yet, such "I-Net" requirements do not protect consumers or serve any such consumer protection regulatory purpose. On the contrary, a requirement that Charter's subscribers pay for a network to serve the local government's telecommunications needs is merely hidden tax burden on cable subscribers where the community as a whole should share in the costs of the local government's needs. Moreover, imposing such an unequal cost burden on only one market participant compounds the harm by hampering that entity's ability to compete.

Equal treatment of cable operator I-Nets is also dictated by the Commission's conclusions regarding the regulation of mixed use networks. Responding to comments, like those from Verizon and AT&T, discussing how LFAs were seeking to regulate

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[28] Comments of AT&T, Inc., MB Docket No. 05-311, at 68 (Feb. 13, 2006).

[29] *See, e.g.*, AT&T Comments at 69 (citing *City of Dallas v. FCC*, 165 F.3d 341, 350 (5th Cir. 1999).

telecommunications and data services through the cable franchise, the Commission reiterated that LFAs' jurisdiction applies only to the provision of "cable services over cable systems."[30] LFAs cannot, the Commission explained, use the cable franchising process to intrude into the telecommunications and other non-cable services provided over a cable system.[31]

The Commission's conclusion must apply with equal force immediately to Charter and other existing cable operators. Cable operators, like Charter, have undertaken significant investments to be able to offer a mix of services in competition with the ILECs. Now, both cable operators and ILECs are poised to offer the "triple play" of video, voice, and data services over "mixed use" networks. And, just as AT&T and Verizon face LFAs wanting free voice and data services that the companies otherwise sell on a commercial basis, so to does Charter, which despite having a commercial Charter Business Services division, faces LFAs seeking to get free voice and data services under the guise of a cable I-Net. The Commission cannot recognize that demanding telecommunications services from ILECs is outside the Title VI authority of LFAs, but then allow those same LFAs to demand free telecommunications and data services from Charter. It is inconsistent with the plain language of the statute, and will not serve the interests of competition or consumers. If it is unreasonable to require a new entrant's customers to pay for telecommunications features of an I-Net, when such services should be obtained in the telecommunications market, it is unreasonable to require the same of any cable operator or its customers.

[30] Order ¶ 121.

[31] *Id.*

IV. CONCLUSION

Based on the foregoing, the Commission should reject its preliminary conclusion that its findings in the Order apply to existing cable operators only upon renewal of their franchises. The Commission's findings, particularly its interpretation of Section 622 regarding franchise fees and Section 611 regarding I-Nets, must apply immediately to all cable operators to promote robust competition that will benefit consumers. Such an immediate, symmetric application of the Commission's interpretations is dictated by the Commission's policies and by the plain language of the statute.

Respectfully Submitted,

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